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No. 90-797

SUPREME COURT, U.S.  
RECORD

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**In the Supreme Court of the United States**

OCTOBER TERM, 1990

GAS SPRING CO., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

BRIEF FOR THE  
NATIONAL LABOR RELATIONS BOARD  
IN OPPOSITION

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### **QUESTION PRESENTED**

1. Whether substantial evidence supports the Board's finding that petitioner, during negotiations, asserted financial difficulties as the basis for its bargaining stance, making unlawful its refusal to disclose financial information requested by the Union.

2. Whether the Board properly found that petitioner's unlawful refusal to produce the financial information requested by the Union was a contributing cause of the strike, making it an unfair labor practice strike.



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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-9a) is unreported. The decision and order of the National Labor Relations Board (Pet. App. 10a-78a) are reported at 296 N.L.R.B. No. 14.

**JURISDICTION**

The judgment of the court of appeals was entered on July 16, 1990. A petition for rehearing was denied on August 21, 1990. Pet. App. 79a. The petition for a writ of certiorari was filed on November 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. On June 6, 1986, petitioner and the Union<sup>1</sup> began collective bargaining negotiations to replace their existing agreement, which was due to expire on June 30, 1986. At this first meeting, petitioner submitted a proposal seeking a wage freeze and substantial reductions in other employee compensation and benefits. Pet. App. 16a-17a. At the second negotiating session, on June 13, petitioner's chief negotiator denied that petitioner was claiming to be in "dire financial straits," but added that petitioner's health was "not good," that 1985 had been "a bad year" for the company, and that 1986 had, so far, "been worse." *Id.* at 17a. In the next meeting on June 17, petitioner argued against a wage increase proposed by the Union on the ground that it "would not make sense" because of a sharp drop in company sales. *Id.* at 18a. On June 20, petitioner's negotiators asserted that petitioner "needed" and "required" concessions and could not "commit" to increases. *Id.* at 20a, 21a.

On June 24, petitioner's negotiators became more insistent, contending that concessions were "required and necessary," that petitioner had lost money in 1985 and 1986, and that it was "heading in[to] the red." Pet. App. 21a. They insisted that petitioner "was not in good shape," that 1985 had been a "bad year," and that 1986 was proving even worse than 1985. *Id.* at 22a. They further pleaded that "everyone [should] see the problem the company was in money wise," and urged the Union's negotiators not to "delude" themselves because "conditions [were] bad and getting worse." *Ibid.*; see *id.* at 23a.

On June 25, a company representative told the Union that he did not want company employees to end up losing their

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<sup>1</sup> Local Union No. 1612, International Union of United Automobile, Aerospace and Agricultural Implement Workers of America (UAW).

jobs like the employees at other local companies, adding that this was the reason for petitioner's overall bargaining stance. Pet. App. 23a-24a. He accused the Union of "not paying attention to what was going on," citing other local companies which he alleged were going out of business due to their inability to obtain union concessions. *Id.* at 24a; see *id.* at 24a-25a.

On June 27, petitioner's vice president attributed petitioner's hard bargaining tactics to its financial condition, explaining that petitioner was losing money and would continue to do so, that "the bottom line is red" and "would remain red," that petitioner's losses were not "tolerable," and that petitioner was "determined" to take action to reverse them. Pet. App. 27a. He also explained that petitioner expected its losses to increase, and "could not consider any wage increases as part of a three year contract" because petitioner could not even "afford to give people raises in the first year [of an] agreement." *Id.* at 33a, 35a (bracketed material in original); see *id.* at 25a-28a.

In bargaining sessions on June 30, petitioner's vice president repeated that petitioner was losing money and would continue to lose money because of a downward trend in business. Pet. App. 34a, 35a. He further asserted that petitioner could not consider any wage increase as part of a three-year contract because it did not expect its financial situation to improve. *Id.* at 35a; see *id.* at 30a-36a.

In response to petitioner's assertions regarding its financial plight, the Union asked to examine petitioner's financial records. The Union repeatedly advised petitioner that it would be willing to bargain over concessions if petitioner could verify its claim of economic hardship, but that it would first need to examine petitioner's financial records. Petitioner consistently refused the Union's information requests. Pet. App. 17a-18a, 20a-23a, 25a, 33a-35a.

On June 28 and again on July 1, the Union's leadership met with the unit employees to inform them about the status of the negotiations. The leadership told the employees that petitioner was claiming to be losing money and was seeking concessions, that the Union had asked petitioner to open its books to substantiate its claim, but that petitioner had refused. At the June 28 meeting, some employees questioned petitioner's claim, waving copies of a newspaper article indicating that petitioner was profitable. At the July 1 meeting, several employees, in the context of a general protest that petitioner's plea of financial hardship was not credible, questioned the Union leadership about petitioner's refusal to disclose its books to the Union. At both meetings, employees demanded to know why petitioner would not open its books and accused petitioner of lying about its financial status. At the end of the July 1 meeting, the leadership called for a strike vote. The employees voted to strike by a 235-12 vote, and commenced the strike that day. Pet. App. 28a-30a, 36a-41a.

On October 6, 1986, the Union made an unconditional offer to return to work on behalf of all employees who had not already done so. Petitioner responded that it considered the striking employees economic strikers and refused to offer them immediate employment, instead placing them on a preferential hiring list and hiring a few of them as positions became available. Pet. App. 41a-42a, 67a-68a.

2. The Board, adopting the decision of the administrative law judge, found that petitioner had violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1) and (5), by refusing to disclose its financial records to the Union. Pet. App. 11a, 61a. The Board noted that "even though [petitioner] contended once that it was merely unwilling to pay and denied that it was in 'dire financial straits,' each discussion of the reasons that [petitioner] would not pay led to factual allegations that it could

not pay as a result of its own compelling financial considerations.” *Id.* at 50a. In addition, the Board found that petitioner’s representations regarding its financial condition were “all clear indications that there was a financial basis that impelled and dictated [petitioner’s] decision into an intractability.” *Ibid.* Further, the Board found that “[a]ll these arguments were pleas that [petitioner] could not pay increases and could not continue operating under the terms of its expiring agreement, in the words of the Supreme Court, ‘without injury to [its] business.’” *Id.* at 51a (citing *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956)). The Board therefore concluded that the financial information requested by the Union was relevant to the performance of its collective-bargaining responsibilities, and that petitioner had violated the Act by refusing the Union’s information requests. Pet. App. 11a-12a.

The Board, agreeing with the administrative law judge, also found that the strike was caused at least in part by petitioner’s refusal to furnish the Union with this financial information. Pet. App. 11a, 65a. The Board noted that the employees’ “dissatisfaction stemmed directly from the unfair labor practice found herein, [in] that they could not understand why they were being asked to give back economic gains they had made” to a company that appeared prosperous and refused to offer any evidence to the contrary. *Id.* at 62a. The Board further noted that the employees might have believed petitioner had it furnished evidence to substantiate its claims, and the employees might therefore have acceded to some or all of petitioner’s demands without a strike, or with a shorter one. *Id.* at 64a. Petitioner’s unlawful rejection of the Union’s information request thus fueled employee cynicism regarding petitioner’s bargaining stance, thereby prompting an “even greater reaction to all the concessions which [petitioner] proposed,” *ibid.*, and contributing to the cause of the strike. Accordingly, the Board

found that the strike constituted an unfair labor practice strike and the striking employees were therefore entitled to immediate reinstatement upon their unconditional offer to return to work. *Id.* at 12a, 67a. Petitioner, by delaying the reinstatement of some of the strikers and by refusing to reinstate others, committed an independent violation of Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3).

The Board ordered petitioner to cease and desist from the unfair labor practices found, to furnish the Union upon request with relevant books and records regarding petitioner's finances, and to reinstate the striking employees with backpay and make whole those strikers whose reinstatement petitioner unduly delayed. Pet. App. 12a, 71a-73a.

3. In an unpublished per curiam decision, the court of appeals upheld the Board's findings that petitioner unlawfully refused to turn over to the Union the financial records it had requested and that the unlawful conduct was a contributing cause of the strike. Pet. App. 6a-9a. The court rejected petitioner's argument that it had simply refused to make bargaining concessions to the Union. The court noted that petitioner's position "is completely eroded by the prevalence in the record of its references to its worsening financial condition, its claims that it was 'heading into the red,' and its forecasts of the loss of jobs." *Id.* at 6a-7a. "There was certainly substantial evidence on which the Board could have concluded that the employer's bargaining position was a claim of financial inability to pay and not an assertion of 'prudent financial considerations.'" *Id.* at 7a.

The court also sustained the Board's finding that the strike was an unfair labor practice strike, ruling that "the record contains substantial evidence from which the Board could have properly found that [petitioner's] refusal to produce its financial information was a contributing cause of the strike." Pet. App. 9a. The court concluded that the evidence

showed that on the date of the strike vote, union leaders explained to employees that union negotiators had asked petitioner to open its books to substantiate its claimed financial difficulties, and that several employees "upon learning that the company had refused to disclose any financial information, \* \* \* questioned the union leaders about the employer's refusal and expressed their disbelief that the apparently profitable employer was experiencing the financial difficulties it claimed." *Id.* at 8a-9a.

### ARGUMENT

1. An employer violates its statutory obligation to bargain in good faith if, during the course of contract negotiations, it refuses to produce information substantiating its claim that it is financially unable to meet a union's bargaining demands. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956). The reason is that if an argument "is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy." *Ibid.* No "magic words" are necessary to trigger an employer's duty to disclose financial information, so long as the employer's words and conduct convey an inability to afford disputed labor costs. *Facet Enterprises, Inc. v. NLRB*, 907 F.2d 963, 980 (10th Cir. 1990); *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d 570, 575 (7th Cir.), cert. denied, 479 U.S. 821 (1986). At the same time, an employer incurs no duty to disclose financial information if it merely conveys its "simple unwillingness to meet the employees' demands, rather than an inability to do so." *Atlanta Hilton & Tower*, 271 N.L.R.B. 1600, 1602 (1984). In that situation, the policies underlying *Truitt* are not implicated since the employer is making no claim susceptible of verification.

Petitioner does not question those principles. Instead, petitioner denies that it claimed during the bargaining

process that it was financially unable to meet the Union's demands, and contends that it merely conveyed to the Union an "unwilling[ness] to pay higher wages in order to ensure long-term financial health and competitiveness." Pet. 17. But the court of appeals found that there was substantial evidence to support the Board's contrary finding, and fact-bound issues of this nature do not warrant review by this Court. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

The decision below does not conflict with the cases cited by petitioner. Pet. 17-19. In those cases, the court recognized that an employer incurs no obligation to disclose its financial records to a union based merely on its claims of competitive disadvantage; an obligation arises only if the employer claims that it is unable to meet the union's demands. See *NLRB v. Harvstone Mfg. Corp.*, 785 F.2d at 575-576; *Nielson Lithographing Co. v. NLRB*, 854 F.2d 1063 (7th Cir. 1988); *Washington Materials, Inc. v. NLRB*, 803 F.2d 1333, 1338-1339 (4th Cir. 1986); *Facet Enterprises, Inc. v. NLRB*, 907 F.2d at 980; *Dallas General Drivers, Local Union No. 745 v. NLRB*, 355 F.2d 842, 845 (D.C. Cir. 1966).<sup>2</sup> In *Washington Materials, Inc. v. NLRB*, the Fourth Circuit adopted the rule that petitioner endorses. In this case, however, the Board and the Fourth Circuit found that petitioner's assertions amounted to the claim that it was unable to meet the Union's demands, not that it sought to maintain a competitive position vis-a-vis other firms. Accordingly, any difference between the decision below and the cases cited by petitioner turns on a difference in the facts, not in the governing legal principle.

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<sup>2</sup> Petitioner also cites *American Model & Pattern Inc. v. NLRB*, No. 816 F.2d 678 (6th Cir. 1987) (Table), but that decision is unpublished and therefore has, at best, limited precedential value. See 6th Cir. R. 24(c).

2. a. A strike is an unfair labor practice strike "if an [employer's] unfair labor practices had anything to do with causing it." *NLRB v. Crystal Springs Shirt Corp.*, 637 F.2d 399, 404 (5th Cir. 1981). Accord *Queen Mary Restaurants Corp. v. NLRB*, 560 F.2d 403, 412 (9th Cir. 1977); *NLRB v. Cast Optics Corp.*, 458 F.2d 398, 407 (3d Cir.), cert. denied, 409 U.S. 850 (1972). Unfair labor practice strikers are entitled to reinstatement to their former or substantially equivalent jobs immediately upon their unconditional offer to return to work, even if replacements for them have been hired. The employer's outright refusal to reinstate, or delay in reinstating, unfair labor practice strikers on the ground that they have been "permanently replaced" constitutes an independent violation of Section 8(a)(1) and (3) of the Act, 29 U.S.C. 158(a)(1) and (3). *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 278 (1956); *NLRB v. Cast Optics Corp.*, 458 F.2d at 407. A strike may be an unfair labor practice strike even if it also may have economic objectives, and unfair labor practice strikers must be reinstated even though there are other causes of the strike. *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319-1321 (7th Cir. 1989); *NLRB v. Heads & Threads Co., a Div. of MSL*, 724 F.2d 282, 288-289 (2d Cir. 1983); *NLRB v. Cast Optics Corp.*, 458 F.2d at 407.<sup>3</sup>

In this case, the Board and the court below properly concluded that petitioner's unlawful refusal to furnish relevant financial data to the Union was a contributing factor in precipitating the strike, making the unreinstated employees unfair labor practice strikers. As shown above, on the date

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<sup>3</sup> Petitioner asserts that the lower courts have varied in defining unfair labor practice strikes. Pet. 12-13. As the cases cited by petitioner make clear, however, each of those courts will find an unfair labor practice strike upon a showing that an unfair labor practice was a contributing cause, or, put another way, had anything to do with causing the strike.

of the strike vote the Union's leaders explained to the employees that petitioner had rejected the Union's request that petitioner open its books to substantiate its claimed financial difficulties. Several employees, upon learning of petitioner's refusal, questioned the union leaders about petitioner's refusal and expressed their disbelief that the apparently profitable employer was experiencing the financial difficulties that it claimed. As the Board found, the employees' "dissatisfaction stemmed directly from the unfair labor practice found herein, [in] that they could not understand why they were being asked to give back economic gains they had made" to a company that appeared prosperous and refused to offer any evidence to the contrary. Pet. App. 62a. Moreover, as the Board noted, the employees "might have believed" petitioner had it furnished evidence to substantiate its claims, and the employees might therefore have acceded to some or all of petitioner's demands, without a strike, or with a shorter one. *Id.* at 64a. Petitioner's unlawful refusal to supply the Union with financial information had the effect of prompting an "even greater reaction to all the concessions" that petitioner proposed, *ibid.*, thereby contributing to the cause or prolongation of the strike.

b. Petitioner maintains that the court of appeals erred by not applying the "mixed motive analysis" of *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), to determine whether the strike would have occurred absent petitioner's unlawful refusal to furnish the information requested by the Union. Pet. 12. That claim does not warrant review by this Court, for two reasons.

First, a "mixed motive analysis" would not aid petitioner, even if such an analysis were appropriate. The administrative law judge, whose findings were adopted by the Board, found that there was "no sufficient proof that the Union would have conducted a strike had there been no

unfair labor practice.” Pet. App. 67a. The administrative law judge noted that the Union had promised to bargain about concessions if petitioner substantiated its claims of financial distress, and “it cannot be predicted that bargaining would have failed” if petitioner had complied with the Union’s request. *Ibid.* In other words, petitioner’s demand for concessions and its unlawful refusal to substantiate its claimed need for them were inextricably intertwined as causal factors of the strike. *NLRB v. Jarm Enterprises, Inc.*, 785 F.2d 195, 204 (7th Cir. 1986) (record supported finding that strike was an unfair labor practice strike where employer’s refusal to furnish financial information “precluded the Union from evaluating the employer’s position, as well as its own, and thus precluded meaningful bargaining”); *Brooks, Inc.*, 228 N.L.R.B. 1365, 1367 & n.12 (1977) (same). See *Nielson Lithographing Co. v. NLRB*, 854 F.2d 1063, 1065 (7th Cir. 1988) (employer’s refusal to substantiate claims of financial hardship forces union “to play Russian roulette” by putting union “to the Hobson’s choice of acceding to a quite possibly exaggerated claim of poverty or risking its members’ jobs”).

In any event, the court of appeals did not err in adhering to the longstanding rule that the mixed-motive causation test applicable to discrimination cases is not the proper standard for assessing strike causation. Pet. App. 8a. Instead, “the dispositive question is whether the employees, in deciding to go on strike, were motivated *in part* by the unfair labor practices committed by their employer, not whether, without that motivation, the employees might have struck for some other reason.” *Northern Wire Corp. v. NLRB*, 887 F.2d at 1319-1320. Accord *Teamsters Local Union No. 515 v. NLRB*, 906 F.2d 719, 723 (D.C. Cir. 1990), cert. denied, No. 90-609 (Jan. 14, 1991). In urging a mixed-motive analysis, petitioner fails to take account

of the particular nature of an unfair labor practice strike. Even if a strike would have occurred despite an employer's unfair labor practices, the strike would still be encumbered with, and not practicably disentangled from, the aggravating factors caused by those unfair labor practices, which tend to prolong a strike. In addition, the mixed-motive analysis applied in the case of discriminatory discharges addresses concerns not involved here. Specifically, it provides a means of reconciling an employer's statutorily recognized interest in discharging employees for cause with the Act's prohibition against discharging employees for engaging in union or other protected activity. 29 U.S.C. 160(c). See *Price Waterhouse v. Hopkins*, 109 S. Ct. at 1789-1790. No such need to sort out conflicting employer motives is involved here because it is the employees' motive, not the employer's, that is at issue.<sup>4</sup>

<sup>4</sup> In contending that a mixed-motive analysis should be applied here, petitioner suggests that its right to hire permanent replacements for economic strikers is analogous to an employer's right to discharge employees for cause and warrants similar deference. Pet. 10-11. The analogy is inapt. While a claim of discriminatory discharge implicates an employer's right to fire an employee for cause, no such mix of lawful and unlawful employer conduct need be unraveled in determining a strike's causation. It is the *employees'* motivation that is at issue, and giving employees the right to reinstatement if the employer's unfair labor practices caused a strike, in part, protects the right to strike guaranteed in Section 13 of the Act, 29 U.S.C. 163. Similarly unavailing is petitioner's comparison, Pet. 11-12, of the situation here to that involved in determining whether a strike called by a union for both a lawful primary objective and an unlawful secondary objective can serve as the basis for a suit for damages under Section 303(b) of the Labor-Management Relations Act, 29 U.S.C. 187(b). In the latter situation, it is necessary to import the requirement that the unlawful secondary objective be a "substantial factor" in causing the strike in order to "protect the union's right to strike for primary objectives where such objectives, standing alone, would have caused the strike." *Mead v. Retail Clerks, Int'l Assn, Local Union No. 839*, 523 F.2d 1371, 1379 (9th Cir. 1975).

The cases cited by petitioner, Pet. 14-15, do not require a different result.<sup>5</sup> The court in each case noted that the employer had failed to show that a strike would have occurred even absent the employer's unfair labor practices. But here, too, petitioner failed to make such a showing. In addition, in none of those cases did the outcome turn on a "but for" analysis; in each case, the court found that the employer's unlawful conduct was a contributing cause of the strike. Accordingly, in each case the court's discussion of this issue was dicta.

### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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<sup>5</sup> *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814, 820 (6th Cir. 1975); *NLRB v. Stackpole Carbon Co.*, 105 F.2d 167, 175-176 (3d Cir.), cert. denied, 308 U.S. 605 (1939); and *NLRB v. Remington Rand, Inc.*, 94 F.2d 862, 872 (2d Cir.), cert. denied, 304 U.S. 576 (1938).